



VII.

July 9, 2021

VIA EMAIL

Chair Esquivel and Members of the State Water Resources Control Board
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814

Re: Protection of Stored Water and Enforcement of California's Water Rights System

Dear Chair Esquivel and Members of the State Water Resources Control Board:

On behalf of the water agencies that serve 40 million people, those who farm more than 6 million acres of land, and those responsible for 300,000 acres of wildlife refuges, the Tehama Colusa Canal Authority, San Luis & Delta-Mendota Water Authority, Friant Water Authority, and State Water Contractors (collectively, "CVP & SWP Agencies") request that you consider, as quickly as possible, immediate action to protect the beneficial uses of water in the San Francisco Bay/Sacramento-San Joaquin Delta Estuary ("Bay-Delta Estuary"), including the releases of previously stored water by the Central Valley Project ("CVP") and State Water Project ("SWP"). Many of us have received a zero allocation for this year's Project water, or significantly reduced public health and safety deliveries, and we all recognize that unauthorized diversions of previously stored water harm CVP and SWP future supplies. The State Water Resources Control Board ("State Water Board") has the authority and the obligation to take action to protect this water.

Action Is Required to Protect Reclamation's and DWR's Ability to Meet Current Requirements

As you are aware, due to the extremely dry conditions this year, the United States Bureau of Reclamation ("Reclamation") and California Department of Water Resources ("DWR") are not able to achieve the purposes established for the CVP and SWP. Among others, the urban, agricultural, fish, and wildlife uses served by the CVP and SWP are suffering. The CVP & SWP Agencies are concerned that suffering is exacerbated by the unauthorized diversion and use of previously stored water by others outside of the CVP and SWP and severely impact Reclamation's and DWR's ability to meet current and future regulatory requirements.

The CVP & SWP Agencies are concerned that the circumstances forewarned by the State Water Board, in its recent order approving Reclamation's and DWR's temporary urgency change petition, have been occurring and will continue to occur, absent action by the State Water Board:

Currently, the Petitioners [Reclamation and DWR] hold primary responsibility for meeting Bay-Delta Plan flows and salinity requirements as part of D-1641. During times of limited supplies like this year, meeting those requirements can require significant contributions of previously stored water releases, both due to limited natural flows and due to other water users diverting water when it is not available under their water rights. These circumstances deplete reservoir storage, and in years like this year when reservoir storage is at critically low levels, create significant concerns for temperature management, health and safety water supplies, and salinity management in the Delta if dry conditions persist.

(June 1, 2021 Order Conditionally Approving a Petition for Temporary Urgency Changes to License and Permit Terms and Conditions Requiring Compliance with Delta Water Quality Objectives in Response to Drought Conditions, page 7.) Indeed, depletions in the Delta have been exceeding conservative forecasts and levels that occurred in previous droughts. The unabated in-Delta depletions impair the ability of Reclamation and DWR to protect reservoir storage and meet in-Delta water quality objectives, including targets for temperature management.

Allowing these circumstances to continue and worsen would be inconsistent with the Governor's recent direction to state agencies to take action to conserve water upstream, protect carry-over storage, and protect water transfers. (May 10, 2021 Drought Proclamation.)

The State Water Board Has the Hydrologic and Hydrodynamic Data to Support Action

More than twenty years ago, the State Water Board acknowledged that there is insufficient water available during certain months of the year to supply riparian water right holders in the southern Delta in certain year types. (Revised D-1641 at p. 33.) Responding to objections from South Delta Water Agency ("SDWA") to a petition to support the San Joaquin River Agreement, the State Water Board rejected claims of injury by SDWA. The State Water Board explained:

The fundamental issue with respect to SDWA's claim that its members have riparian rights that could be impaired by the proposed changes, therefore, is whether there is sufficient natural flow to satisfy the diversion requirements of riparian right holders in the southern Delta.

(Revised D-1641 at p. 30.) After reviewing evidence, including evidence presented by SDWA, and making assumptions that favored SDWA, the State Water Board rendered three conclusions:

1. On average, insufficient water is available to supply the southern Delta in Below Normal, Dry and Critical Dry years in August, September and October.
2. On average, sufficient water is available in September only in Wet Years.

3. Insufficient water is available in July during 16 percent of years, in August during 56 percent of years, in September during 78 percent of years, and in October during 70 percent of years.

(*Id.* at p. 33.) Given the current water year's classification as Critically Dry, there is no doubt that this is a year in which there is insufficient water to support the diversion of water in the southern Delta under riparian rights.

Moreover, current hydrologic and hydrodynamic data demonstrate that more water is being diverted from the Delta than natural flow to support such diversions. In DWR's June 28, 2021 Delta Operations Summary, DWR reports 8,859 cubic feet per second ("cfs") of water flowing into the Delta, the majority of which is previously CVP and SWP stored water releases. Reclamation and DWR are making 3,500 cfs available for outflow and are pumping a total of 900 cfs through the C.W. "Bill" Jones and Harvey O. Banks pumping plants. (See attached DWR Delta Operations Summary for June 28, 2021.) Using simple flow balance, in-Delta depletions are estimated to be 4,450 cfs, which exceeds the total outflow and CVP/SWP combined pumping. (*Id.*) The rights asserted by those within the Delta do not support the current level of depletions, and neither in-Delta riparian nor appropriation water right holders are entitled to divert previously stored water under their water rights. (*El Dorado Irr. Dist. v. SWRCB* (2006) 142 Cal.App.4th 937, 962, 976; see also *Phelps v. SWRCB* (2007) 157 Cal.App.4th 89, 107, 111.) Because of unabated depletions in the Delta, Reclamation and DWR have been required to increase their release of CVP and SWP water from storage and/or reduce the amount of water pumped at the Jones and Banks pumping plants, depriving the CVP and SWP of critical water supplies and placing at risk the ability of Reclamation and DWR to meet the terms and conditions of their water rights, and specifically those intended to protect the Bay-Delta Estuary.

The State Water Board has the Authority to Take Action

We encourage the State Water Board to act immediately and protect the previously stored CVP and SWP water and ensure all water rights are exercised in accordance with the law. The State Water Board must take action, using best available data and respecting due process, to stop unlawful appropriation of previously stored CVP and SWP water or other appropriations not supported by law and hydrology.

We support the State Water Board's efforts to collect data to inform water rights administration, and encourage it to improve upon the data collection effort it began during the last drought. Action is required *now* to improve upon existing data and expedite decision making.

Conclusion

There is no doubt that the task before the State Water Board is a difficult one. The State Water Board must take immediate action to protect CVP and SWP water flowing through the Delta. It must also continue to shore up data collection so it can be better prepared to take action in future droughts.

For all the reasons outlined in this letter, the CVP & SWP Agencies respectfully request that the State Water Board take immediate action to protect the beneficial uses of water in the Bay-Delta Estuary by protecting previously stored water from unauthorized diversions.

Regards,



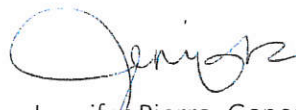
Federico Barajas, Executive Director
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cc: Ernest Conant
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VN.



July 29, 2021

Via Email – commentletters@waterboards.ca.gov

Ms. Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814

Re: 8/3/2021 BOARD MEETING – ITEM #5 (Consideration of a proposed Resolution to adopt an Emergency Curtailment and Reporting Regulation for the Sacramento-San Joaquin Delta (Delta) Watershed)

Dear Ms. Townsend,

This letter is submitted on behalf of the San Luis & Delta-Mendota Water Authority, Friant Water Authority, and Tehama Colusa Canal Authority ("Water Authorities") regarding Item #5, Consideration of a proposed Resolution to adopt an Emergency Curtailment and Reporting Regulation for the Sacramento-San Joaquin Delta (Delta) Watershed, at the upcoming August 3, 2021 meeting of the State Water Resources Control Board ("State Water Board").

The Water Authorities have reviewed the State Water Board's proposed "Resolution No. 2021-____ to Adopt an Emergency Curtailment and Reporting Regulation for the Sacramento-San Joaquin Delta (Delta) Watershed" and the draft regulations that would add or revise sections 876.1, 877.1, 878, 878.1, 878.2, 879, 879.1, and 879.2 of Title 23 of the California Code of Regulations ("Draft Emergency Regulations"). We appreciate the State Water Board's attention to our prior request for action to protect releases of previously stored water by the Central Valley Project ("CVP") and water transfers that are moving through the Delta. We encourage the State Water Board to take action to protect previously stored water and offer minor amendments to the Draft Emergency Regulations.

Given the underlying lack of precipitation and unanticipated reduction in the amount of runoff into reservoirs and streams this year compared to forecasts, action to curtail unauthorized diversions has become increasingly necessary to protect the United States Bureau of Reclamation's ("Reclamation") ability to achieve the urban, agricultural, and fish and wildlife

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purposes established for the CVP that are met through releases of previously stored water. Despite only having the responsibility of managing a portion of flows in the Delta watershed, Reclamation (with the California Department of Water Resources) holds primary responsibility for meeting Bay-Delta Plan objectives, and unabated, unauthorized in-Delta diversions have already significantly impaired Reclamation's ability to successfully meet those objectives and protect storage in CVP reservoirs, as detailed in the operations plan conditionally approved by the State Water Board Executive Director. Allowing these unauthorized diversions to continue is inconsistent with the Governor's direction to state agencies to take action to conserve water upstream, protect carry-over storage, and protect water transfers. (May 10, 2021 Drought Proclamation.) In addition, unauthorized diversions of previously stored water pose great risk to CVP future supplies, which would have additional impacts to the Water Authorities' member agencies that are already suffering in the current drought.

The Water Authorities offer the following comments regarding the proposed Resolution and Draft Emergency Regulations. First, the Draft Emergency Regulations, Section 876.1, should be revised to clarify that the curtailments do not apply to diversions under valid contract right, authorized water transfers, or to water user storage. In contrast, the curtailments should apply to enforce against diversions of natural flows and unauthorized diversions of previously stored Project water. Second, Section 878.2, should contain specific time frames for the Deputy Director's consideration of alternative water sharing agreements. Third, the State Water Board should consider revising section 4 of the proposed Resolution that states the regulation would remain in effect for one year after filing with the Secretary of State. Given the potential for increased precipitation later in the calendar year, a shorter term seems appropriate, with an option for the State Water Board to extend the term if conditions remain dry and demand remains high. Finally, we recommend the State Water Board continue to consider comments provided by interested parties on related issues.

We appreciate the direction in the proposed Resolution that staff should engage with stakeholders to identify and explore other approaches to address severe water supply shortages and related concerns in the near future. (See proposed Resolution, § 7.) That process as well as continued data collection efforts will provide important opportunity for engagement, increase transparency, and provide additional information on the appropriation of water.

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July 29, 2021
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In closing, we encourage the State Water Board to act swiftly to protect previously stored and transfer water and ensure all water rights are exercised in accordance with the law.

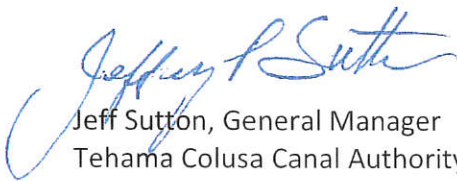
Regards,



Federico Barajas, Executive Director
San Luis & Delta-Mendota Water Authority



Jason Phillips, Chief Executive Officer
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Jeff Sutton, General Manager
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